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7 IN THE UNITED STATES DISTRICT COURT

8 FOR THE NORTHERN DISTRICT OF CALIFORNIA

9
10 BRENTON DUANE AVERY,

No. C 05-0700 CW

11 Petitioner,

12 v.

ORDER DENYING
PETITION FOR WRIT
OF HABEAS CORPUS

13 SCOTT KERNAN, Warden,

14 Respondent.

15 _____/

16
17 INTRODUCTION

18 Petitioner Brenton Avery, an individual incarcerated at
19 California State Prison, Solano (CSP, Solano), petitions for a writ
20 of habeas corpus under 28 U.S.C. § 2254. Respondent D.K. Sisto,
21 Warden of CSP, Solano, opposes the petition.¹ Having considered
22 the parties' papers, the Court DENIES Avery's petition for a writ
23 of habeas corpus.

24 BACKGROUND

25 In its unpublished opinion on Avery's direct appeal, the

26
27 _____
28 ¹The Court substitutes the current warden, D.K. Sisto, for
Scott Kernan as Respondent.

1 California Court of Appeal described the factual background of the
2 case as follows:

3 It was about 7 p.m. on December 19, 2001, and
4 raining heavily when two couples--the Swetts and the
5 Deutsches--emerged from different points in the
6 Coddington Mall. The Swetts and Mr. Deutsch went into
7 the parking lot to their respective vehicles. As Mr.
8 Deutsch approached his truck, he saw three men wearing
9 dark clothes and knit caps standing under a nearby
10 tree. As Deutsch was getting into his truck, he was
11 grabbed and struck in the face. While this was
12 happening, Deutsch noticed that the three men were no
13 longer under the tree. Deutsch was pulled from his
14 truck, punched in the face, and kicked in the ribs
15 (fracturing several) when he was on the ground. He was
16 told to give up his wallet. Apparently discovering
17 that Deutsch did not carry a wallet, the men took his
18 watch and other items. His assailants' faces were
19 covered by ski masks. Filled with fear, Deutsch yelled
20 for help. His yell was heard by Ms. Swett, who--from
21 50 feet away--saw Deutsch on the ground surrounded by
22 three men in dark clothing and hoods. Seeing Mr.
23 Swett, the three ran. With Mr. Swett in pursuit, the
24 three men jumped into a reddish-orange car and drove
25 away. The crime was reported and police began looking
26 for the car and the suspects.

27 It was still raining when approximately 30 minutes
28 later, Morene Garcia and her five children were driving
up to the Catholic Charities homeless shelter. She
observed two men wearing jackets with hoods nearby.
After Ms. Garcia opened her car trunk to remove some
belongings, one of the men, who was wearing a ski mask,
came up to her. Ms. Garcia told the man he frightened
her, to which he replied that was what he was trying to
do. The man demanded her purse and money. The other
man came up behind her. A third man some feet away
yelled to the other that "She doesn't have anything,
let's go." When the men started to walk away, Ms.
Garcia ran into the shelter and told one of the staff
what had happened. The staff member called police.
Police arrived within two or three minutes.

When Ms. Garcia ran into the shelter and reported
the incident, another resident of the shelter, Lorin
Mitchel, then ran outside because he was concerned for
his daughter who was near where Ms. Garcia described
the incident as occurring. In the stairwell of a
parking structure across the street from the shelter,
Mitchel observed two men, one of whom was "pulling down
a mask over his face." Mitchel closed to a distance of
only five or six feet and was able to identify the man

1 as appellant Beck.² Avery came up to Beck and the two
2 were talking when Officer Lazzarini arrived in a patrol
3 car. Mitchel alerted Lazzarini to Beck and Avery's
4 location and provided their description. When a red
5 car with its headlights turned off drove past, Officer
6 Lazzarini reported it over his car radio.

7 Based on that report, and one of the vehicles seen
8 leaving the mall, the red car was stopped by a number
9 of officers. Beck was driving; Avery was in the rear
10 seat.³ Beck was removing leather gloves, which were
11 wet. Avery was extremely nervous. Inside the car
12 police found three ski masks (two of which were wet)
13 and two additional pairs of wet gloves.

14 Following defendants' arrest Mr. and Ms. Swett
15 were brought to the scene, where she identified the
16 trio as the parking lot assailants "[b]ased only on
17 size." She also identified the car as the one in which
18 she saw them drive [sic] away from the mall parking
19 lot. Mr. Swett was positive that it was the same car,
20 but he made not certain identification of the persons.
21 Mr. Mitchel was also brought to the scene, where he
22 positively identified defendants. Ms. Garcia made a
23 partial identification of Beck based on the sweatshirt
24 worn by one of the other men, i.e., the ones who did
not demand her money. . . .

25 Questioned at the police station by Detective
Henry, Beck stated that the car was his and that no
else had driven it.

15 Respondent's Ex. D at 2-4.

16 Mitchel was one of the prosecution's witnesses at trial. He
17 was the only witness to make a definite in-court identification of
18 Beck and Avery. During Mitchel's testimony it was disclosed that
19 he had violated his parole. It was also disclosed that, in
20 exchange for his testimony, the government promised Mitchel that he
21 would be returned directly to New Folsom prison, the prison where
22 he had earlier been placed, instead of being processed through San
23

24
25 ²The California Court of Appeal consolidated Avery's appeal
with that of his co-defendant Jerome Beck.

26
27 ³The front seat was occupied by a man named Rick Robinson, who
was charged with the same crimes as Beck and Avery. Shortly before
trial Robinson entered pleas of guilty to the charges.

1 Quentin. This would prevent Mitchel from having a "snitch jacket"
2 placed on his file.

3 On June 28, 2002, the prosecutor received a letter from
4 Mitchel, which stated:

5 Carla,

6 Well today is/was my first day of testimony, let
me tell you I don't want to ever do this again.

7 I want to apoligize [sic] to you for how I spoke
8 to you when we first met. I had know write [sic] to
dissrespect [sic] you like that. Believe [sic] it or
not I have more class then [sic] that + should have
used it. So again I am sorry. I also want to thank
9 you for getting me a straight shot back to New Folsom.
There are two things that got me to give my testimony,
10 the straight shot being the second thing.

11 Anyway as you know I parole July 29. My 64\$
question is how would you feel about letting me take
12 you to dinner? It would be my honor. (I would have
realy perfered [sic] to ask to your face, but you never
seemed to be alone + a lot can happen in 33 days) + I
13 guarantee you tell me what you want to eat, I'll know
the best place to go! So let me know what you decide.
14 If I'm not here, here's my address.

15 Petitioner's Ex. G.

16 The prosecutor brought the letter to defendants' attorneys'
17 attention, and, on July 1, 2002, counsel for Avery's co-defendant
18 Beck requested that the parties meet with the judge outside of the
19 jury's presence. At that time, both the prosecutor and Beck's
20 attorney had made their closing arguments.

21 After the trial judge reviewed the letter, she asked, "So what
22 is the purpose of bringing this to my attention?" RT 836. Beck's
23 attorney responded, "I think that there should be some manner in
24 which it could be introduced to the jury." Id. The trial court
25 responded, "The case has been submitted to the jury. I mean, the
26 evidentiary phase of the case is over and there's been two closing
27 arguments. I'm going to make it part of the record, but I'm going

1 to deny the request." *Id.* Avery's trial counsel proceeded to make
2 her closing argument.

LEGAL STANDARD

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a district court may grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court only if the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

"Clearly established federal law" refers to "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." Williams (Terry) v. Taylor, 529 U.S. 362, 402-04, 412 (2000). A state court decision may not be overturned on habeas review simply because of a conflict with circuit-based law. Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 2000). However, circuit court decisions may be persuasive authority to determine whether a particular state court holding is an "unreasonable application" of Supreme Court precedent or to assess what law is "clearly established." Id.; see also Clark v. Murphy, 331 F.3d 1062, 1070-71 (9th Cir.), cert. denied, 124 S. Ct 446 (2003); Moore v. Calderon, 108 F.3d 261, 264 (9th Cir. 1997).

27 A state court's decision is "contrary to" Supreme Court law if

1 the state court "arrives at a conclusion opposite to that reached
2 by [the Supreme Court] on a question of law," or reaches a
3 different conclusion based on facts indistinguishable from a
4 Supreme Court case. Williams, 529 U.S. at 412-13. A state court's
5 decision constitutes an "unreasonable application" of Supreme Court
6 precedent if the state court "either (1) correctly identifies the
7 governing rule but then applies it to a new set of facts in a way
8 that is objectively unreasonable, or (2) extends or fails to extend
9 a clearly established legal principle to a new context in a way
10 that is objectively unreasonable." Id. at 407. An "unreasonable
11 application" of federal law is different from an incorrect or
12 erroneous application of federal law. Id. at 412. Accordingly,
13 "a federal habeas court may not issue the writ simply because that
14 court concludes in its independent judgment that the relevant state
15 court decision applied clearly established federal law erroneously
16 or incorrectly. Rather, that application must also be
17 unreasonable." Id. at 411. The reasonableness inquiry under the
18 "unreasonable application" clause is objective. Id. at 409.

19 In determining whether the state court's decision is contrary
20 to, or involved an unreasonable application of, clearly established
21 federal law, a federal court looks to the decision of the highest
22 state court to address the merits of a petitioner's claim in a
23 reasoned decision. LaJoie v. Thompson, 217 F.3d 663, 669 n.7 (9th
24 Cir. 2000). If the state court considered only state law, the
25 federal court must ask whether state law, as explained by the state
26 court, is "contrary to" clearly established governing federal law.
27 See Lockhart v. Terhune, 250 F.3d 1223, 1230 (9th Cir. 2001). If

1 the state court, relying on state law, correctly identified the
2 governing federal legal rules, the federal court must ask whether
3 the state court applied them unreasonably to the facts. Id. at
4 1232.

5 DISCUSSION

6 I. Waiver

7 Petitioner claims that the trial court's refusal to reopen the
8 case to allow him to present Mitchel's letter to the jury violated
9 his rights under the Sixth and Fourteenth Amendments. Respondent
10 first argues that Petitioner waived this claim because his attorney
11 did not object to the trial court's decision not to reopen the
12 case. Indeed, it was Petitioner's co-defendant's attorney who
13 introduced the letter and requested that the letter be introduced
14 to the jury. RT 836. Petitioner's counsel did not speak during
15 the colloquy regarding the letter. See id. at 835-36.

16 Because Petitioner's counsel did not seek to have the letter
17 provided to the jury, the California Court of Appeal found that he
18 had not preserved the issue for appeal. In People v. Brown, 110
19 Cal. App. 3d 24 (1980), the California Court of Appeal held, "On
20 appeal, a defendant cannot take advantage of objections made by a
21 codefendant in the absence of stipulation or understanding to that
22 effect." Id. at 35 (citing People v. Cooper, 7 Cal. App. 3d 200,
23 205 (1970); People v. Ortega, 2 Cal. App.3d 884, 894-895 (1969)).

24 The Supreme Court has held,

25 In all cases in which a state prisoner has defaulted
26 his federal claims in state court pursuant to an
independent and adequate state procedural rule,
27 federal habeas review of the claims is barred unless
the prisoner can demonstrate cause for the default and

1 actual prejudice as a result of the alleged violation
2 of federal law, or demonstrate that failure to
3 consider the claims will result in a fundamental
4 miscarriage of justice.

5 Coleman v. Thompson, 501 U.S. 722, 750 (1991).

6 Petitioner suggests that the California court's finding that
7 his claim was waived was not based on an independent and adequate
8 state procedural rule. Petitioner cites various cases in which
9 California courts have found that a failure explicitly to object at
10 trial does not bar a defendant from raising an issue on appeal.

11 For example, Petitioner cites People v. Hill, 17 Cal. 4th 800
12 (1998), where the California Supreme Court noted several exceptions
13 to the usual rule that "a defendant may not complain on appeal of
14 prosecutorial misconduct unless in a timely fashion--and on the
15 same ground--the defendant made an assignment of misconduct and
16 requested that the jury be admonished to disregard the
17 impropriety." Id. at 820 (quoting People v. Samayoa, 15 Cal. 4th
18 795, 841 (1997)). However, none of the situations cited in Hill
19 are analogous to Petitioner's. For example, the Hill court noted
20 that, in the context of prosecutorial misconduct, a defendant need
21 not object and request a curative instruction "when an objection
22 would be futile because in the circumstances a retraction by the
23 prosecutor or an admonition by the court could not obviate the
24 prejudicial effect of the misconduct on the jury." People v.
25 Green, 27 Cal. 3d 1, 28 (1980).

26 Here, Petitioner has not established cause for his attorney's
27 failure to join in his co-defendant's counsel's motion or that he
28 was prejudiced by the trial court's decision not to reopen the

1 trial to allow the jury to consider Mitchel's letter. Moreover,
2 finding that this claim is waived rather than considering it on its
3 merits will not constitute a fundamental miscarriage of justice.
4 Therefore, the Court finds that Petitioner's claim is waived.

5 II. Motion to Reopen Evidence

6 Even if the Court were to consider Petitioner's claim, there
7 is no basis upon which the petition can be granted. Petitioner
8 challenges on two bases the trial court's decision not to reopen
9 the case to allow the jury to consider Mitchel's letter. First,
10 Petitioner argues that the trial court violated his right to due
11 process when, after closing arguments, it allowed the prosecutor to
12 enter into evidence her exhibits, which had already been marked for
13 identification, but disallowed Petitioner's co-defendant's request
14 to reopen evidence to present Mitchel's letter to the jury. As the
15 Court of Appeal noted, the prosecution's "exhibits had all been
16 authenticated, identified, or used to assist the testimony of
17 witnesses." Respondent's Exhibit D at 13. This small procedural
18 allowance to the prosecutor, of which the jury would not even be
19 aware, is not comparable to allowing the defense to reopen the case
20 to present new evidence and argument to the jury.

21 Next, Petitioner argues that the trial court's decision
22 impeded his ability to present a complete defense. In Crane v.
23 Kentucky, the Supreme Court held, "Whether rooted directly in the
24 Due Process Clause of the Fourteenth Amendment, or in the
25 Compulsory Process or Confrontation clauses of the Sixth Amendment,
26 the Constitution guarantees criminal defendants a meaningful
27 opportunity to present a complete defense." 476 U.S. 683, 690

1 (1986) (internal citations and quotation marks omitted); see also
2 Deptris v. Kuykendall, 239 F.3d 1057, 1062 (9th Cir. 2001) ("The
3 Supreme Court has made clear that the exclusion of critical
4 corroborative defense evidence may violate both the . . . due
5 process right to a fair trial and the Sixth Amendment right to
6 present a defense.").

7 Even if Mitchel's letter can be considered evidence of bias,
8 preventing the jury from considering the letter does not rise to
9 the level of a constitutional violation. As described above, the
10 letter states, "There are two things that got me to give my
11 testimony, the straight shot [back to New Folsom] being the second
12 thing." Respondent's Exhibit G. Presumably the first thing is
13 Mitchel's desire to have a date with the prosecutor. This is the
14 only potential basis for a finding of bias not disclosed to the
15 jury. The jury was already aware of the prosecution's arrangement
16 to have Mitchel returned directly to New Folsom prison.

17 That Mitchel might have been interested in a date with the
18 prosecutor does not constitute significant defense evidence. The
19 jury was already aware of some factors calling into question
20 Mitchel's credibility. Moreover, there was other evidence,
21 independent of Mitchel's testimony, linking Avery to the crime.
22 The Swetts identified the car in which Avery and his co-defendant
23 were found, Ms. Swett identified Avery based on his size and, at
24 the time of his arrest, Avery possessed the watch taken from Mr.
25 Deutsch.

1

CONCLUSION

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For the reasons set forth above, Avery's amended petition for
3 writ of habeas corpus is DENIED (Docket No. 16). The Clerk shall
4 enter judgment against Petitioner and close the file. The parties
5 shall bear their own costs.

6

IT IS SO ORDERED.

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Dated: 9/5/08

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Claudia Wilken

CLAUDIA WILKEN
United States District Judge

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1
2 UNITED STATES DISTRICT COURT
3 FOR THE
4 NORTHERN DISTRICT OF CALIFORNIA

5 AVERY,

6 Plaintiff,

7 Case Number: CV05-00700 CW

8 **CERTIFICATE OF SERVICE**

9 v.

10 KERNAN et al,

11 Defendant.

12 /

13 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court,
14 Northern District of California.

15 That on September 5, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said
16 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
17 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located
18 in the Clerk's office.

19 Breton Duane Avery T-70275
20 CSP Sac-New Folsom
21 300 Prison Rd.
22 P.O. Box 290066
23 Represa, CA 95671

24 Kelly Michelle Croxton
25 Duputy Attorney General
26 455 Golden Gate Avenue, Suite 11000
27 San Francisco, CA 94102-7004

28 Dated: September 5, 2008

29 Richard W. Wieking, Clerk
30 By: Sheilah Cahill, Deputy Clerk